United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1444

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

HAROLD JACOB MIMS,

Defendant-Appellant.

Appeal From The United States District Court
For The Western District Of New York

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

ARGUMENT

TABLE OF CASES

ISSUES PRESENTED*

I. Whether the trial evidence was sufficient to sustain a conviction of aiding and abetting in the commission of a bank robbery and conspiracy.

The Government's position is that there is substantial evidence supporting this verdict.

II. Whether the evidence of the defendant's fingerprints found on the getaway car was properly admitted and used during the trial.

The Government's position is that this evidence is very probative and was properly admitted and used against the defendant.

III. Whether the admission into evidence of a mug shot, taken on the date of the arrest for the very crime which the defendant stands trial, creates an inference of prior criminal conduct.

The Government's position is that no such inference was sought, created or argued by the prosecution and no error was committed.

IV. Whether statements made by the prosecutor in his summation of the evidence and argument to the jury constitute reversible error.

The Government contends that the statements of the prosecutor to the jury in his closing argument represent fair comment on the admissible evidence and do not amount to error, and certainly not reversible error.

V. Whether the trial court erred in admitting the defendant's statements and admissions into evidence.

The Government contends that the defendant was afforded a full and fair hearing and the court properly held that his statements were voluntary and admissible.

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*This case has not previously been before this Court.

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Counterstatement of the Case

On July 21, 1976, Harold J. Mims was convicted of Conspiracy and Bank Robbery. The jury found the defendant "not guilty" of the charge of Armed Bank Robbery in violation of Title 18, United States Code, Section 2113(d).

The jury trial began on July 13, 1976 and approximately 21 witnesses testified during the trial. On July 21, 1976 the jury returned its verdict.

On September 13, 1976, Harold J. Mims was sentenced to a term of imprisonment of 8 years on the bank robbery and 5 years on the conspiracy charge, to be served concurrently.

Counterstatement of the Facts

On July 1, 1975, four black males entered the Elmgrove Branch of Marine Midland Bank-Rochester and armed with a double-barreled, sawed-off shotgun and several handguns assaulted the customers and employees of that bank. In addition to numerous threats of violence on bank employees, a police officer was disarmed and threatened during the course of the robbery. After securing everyone in the vault of the bank, the four robbers left taking money totaling approximately $31,507. After the robbery, the four escaped in a 1973 Pontiac LeMans bearing N.Y. registration 109 EFL. (Tr. 325).

The 1973 Pontiac LeMans was found abandoned on July 9, 1975 at St. Mary's Hospital, Rochester, N.Y. (Tr. 331). The steering columns and ignition were substantially damaged in an apparent effort to make it look as though the car was stolen. The Rochester Police Department expert testified that a key had to be used to drive the car because it was equipped with a transmission lock and a locked steering column. (Tr. 334-335). Witness Terry Woodard testified on behalf of the Defendant Mims. She testified that she had dated Mims and he had used the car in her presence, the last time being June 20 or 21, 1975. (Tr. 643). The defendant's fingerprints were found on the getaway car when it was recovered on July 9, 1975. (Tr. 346; 363).

Within one hour of the bank robbery and after being informed of the license number of the getaway car, the F.B.I. notified all police agencies by radio that a blue Camaro with license number 299EFL and a brown Cadillac with license number 344EFQ should be considered as "switch cars". (Tr. 376-377). Almost simultaneously with this broadcast, a State Policeman and a Genesee County Sheriff's Deputy spotted the two vehicles travelling together away from Rochester. (Tr. 388).

Following a high speed chase at speeds in excess of 120 mph, the Camaro crashed and the driver was arrested. (Tr. 420-432).

The driver was Malachi Mims, the brother of this defendant, and in the car was found approximately $29,000 from the bank; weapons used during the robbery and clothing used during the robbery. (Tr. 432).

The Cadillac, driven by Harold J. Mims, was being followed by the State Policeman. With the police behind, the Cadillac made a 180° turn and headed past the police going in the opposite direction. (Tr. 390). After pursuing this Cadillac for approximately 8 miles at speeds in excess of 85 mph, the car pulled to the side of the road and Mims was placed under arrest. (Tr. 389-391). After being advised of the bank robbery charges, Harold Mims made a false exculpatory statement to the effect that it was a big mistake and he (Mims) didn't know what the Trooper was talking about. (Tr. 399).

After being transported to Batavia, the defendant made a free and voluntary statement to the F.B.I. concerning his knowledge of and participation in the subject bank robbery including many details concerning how the bank robbery was set up and carried out. (Tr. 2-120; Tr. 503-531; Tr. 601-619).

ARGUMENT

POINT I

The evidence at trial was substantial and fully sufficient for the jury to convict the defendant.

The defendant readily concedes that the jury verdict here is consistent with the trial evidence. However, he questions the quantity and quality of that evidence as a prelude to the substance of his brief in an obvious effort to lend support to very weak claims of error.

In reviewing this issue, this Court must examine the evidence in the light most favorable to the Government and must determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt, making full allowance for the jury to assess the credibility of the witnesses, weigh the evidence and draw justifiable inferences from it. Cr. *U.S. v. Barash*, 412 F.2d 26 (2nd Cir. 1969); *U.S. v. Aiken*, 373 (F.2d 294) (2nd Cir. 1967); *U.S. v. Wilson*, 342 F.2d 43 (2nd Cir. 1965); *U.S. v. DeSisto*, 329 F.2d 929 (2nd Cir. 1964); *cert. denied* 388 U.S. 979 (1964).

In this case, the evidence, particularly when viewed in the light most favorable to the Government, presents an overwhelming case that the appellant is guilty beyond a reasonable doubt. This evidence is as follows:

1. The testimony of the government witnesses established without doubt that a robbery occurred of the Marine Midland Bank, the deposits of which were then insured by the FDIC, and that approximately $31,507 was taken from the employees of the bank by the use of force, violence and intimidation.

2. Shortly after the robbery, Malachi Mims and Harold Mims were seen driving, one behind the other, going away from Rochester. They are brothers.

3. After spotting the police, both cars took off in a high speed chase. In one car, the Camaro, very incriminating evidence was found including the weapons used, clothing and $29,000 of the bank robbery money. The other car, the Cadillac, driven by Harold J. Mims, after being spotted and chased, completely changed directions in order to avoid being caught. After a chase of 8 to 9 miles at speeds of up to 85 mph the Cadillac pulled over. Since no incriminating evidence was found in the Cadillac, the only possible reason for this flight was a consciousness of guilt.

4. Harold J. Mims, after being stopped by the State Police and advised he was arrested for a Rochester bank robbery made a false exculpatory statement to the effect that it was a big mistake and he (Mims) did not know anything about it. Since he did in fact know all about it, this evidence certainly demonstrates a consciousness of guilt.

5. The fingerprints of Harold J. Mims were found on the "getaway" car and the surveillance photos of the bank robbery show the robbers putting gloves on after they get into the bank.

6. The defendant offered proof through defense witness Terry Woodard of an explanation for his fingerprints on that car. This proof was false and misleading to the jury because:

(a) Harold J. Mims had access to the car and keys.

(b) The car, although made to look like it had been stolen, had to have been operated with keys, because of the steering and transmission locks.

(c) The last time Harold J. Mims had access to the car prior to the bank robbery was June 21.

(d) The fingerprint expert from the F.B.I. laboratory testified, in effect, that if the prints had been put on the window on June 21, they would not have been found, or at least not as clearly formed, on July 9 when the car was found and the latent prints lifted.

This proof is persuasive in a positive manner in that it showed that the defendant had access to the keys needed to operate the "getaway" car. In addition, the jury could draw some inference of the defendant's consciousness of guilt by the offering a false explanation for his fingerprints.

7. The defendant made numerous oral admissions to several F.B.I. agents to the effect that he had helped plan the robbery; knew all the participants; drove with them from Buffalo on the morning of the robbery; knew the set-up and escape in phenomenal detail; and was to receive at least $700 from the bank robbery for driving a car. Of particular importance is the fact that the defendant said only 4 people came from Buffalo the morning of the bank robbery and he described only 3 people going into the bank with himself outside the bank some distance away. This statement was given by Mims prior to his knowledge that there were surveillance photos showing 4 people in the bank at the robbery. While Mims at one point did mention a 5th person who participated, that person he described as "white". There is no question that 4 black males robbed this bank.

While there is certainly other evidence upon which the jury could base its findings, these items alone lead irresistably to the conclusion that the defendant could be found guilty beyond a reasonable doubt by the jury.

The fact that the government's case rested, in part, on circumstantial evidence is of significant import. *U.S. v. Harris*, 435 F.2d 74 (1970). It is well-recognized, of course, that circumstantial evidence is not an inferior type of evidence and is no different from direct testimonial evidence. *Holland v. U.S.*, 348 U.S. 121 (1954); *U.S. v. Brown*, 236 F.2d 403 (2d Cir. 1956). As the Supreme Court has remarked, "[D]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Micholic v. Cleveland Tanker, Inc.*, 364 U.S. 325 (1960).

In this case, the evidence, both direct and circumstantial is overwhelming. While the defendant-appellant clearly disagrees with the jury verdict, it can hardly be seriously argued that there was not substantial evidence upon which the jury could rely to support its verdict.

POINT II

The evidence of the defendant's fingerprints found on the "getaway" car was properly admitted into evidence against the defendant.

Fingerprint evidence, because of its reliability, is obviously the type favored by the courts. In this case the evidence that the defendant's prints were found on the "getaway" car is so probative that citation to case law on the subject is unnecessary.

In its brief, the defendant contends that the government's proof must show that the defendant did not have access to the car, except during the robbery. In this regard the defendant ignores the fact that the government need not negate all inferences consistent with innocence which could arise from the fingerprints. *Holland v. U.S.*, 348 U.S. 121 (1954).

Furthermore, the cases cited by the defendant in support of his assertions are those in which there was no other evidence of guilt against the defendant. These cases are obviously distinguishable if only on the basis that there is a wealth of other proof in this case against Harold J. Mims (Brief, *supra*, POINT I).

In addition, the government offered proof that the prints on the "getaway" car could not have remained on the car since June 21 to July 9 and still be of the same quality as were the latent prints. (Tr. 360-369). This is the obvious point of the defendant's assertion of access to this car as testified to by Terry Woodard.

The testimony of the government expert was proper and admissible regarding the length of time the fingerprints would last. In this regard, Rochester Police Detective King testified that the car was recovered in a parking garage and had been there for several days. (Tr. 336). Defense witness Terry Woodard testified that she parked her car in the driveway and drove it 5 miles to work and that it remained in a parking garage while at work. (Tr. 644-645). There is no doubt that this expert could give his opinion regarding scientific, technical or other specialized knowledge. Rule 702, *Federal Rules of Evidence*. Whether or not such evidence will be admitted lies within the sound discretion of the trial judge, and his decision will not be reversed, unless he abuses that discretion. Cf. *Hamling v. U.S.*, 418 U.S. 87 (1974); *U.S. v. Pacelli*, 521 F.2d 135 (2nd Cir. 1975). This is no evidence here that the trial judge abused his discretion.

In the last analysis, the defendant's complaint here is that since there is a "reasonable" explanation for the fingerprints they should not have been admitted into evidence. This position ignores the fact that the explanation for the fingerprints was not actually known until the defense witness Woodard took the stand and, more importantly, that it is the jury's function to resolve the facts where there is inconsistent testimony. The jury assigns the weight to be given to all testimony.

In this regard, there is at least some evidence that this jury rejected the fingerprint evidence because of its verdict in finding the defendant "not guilty" on the charge of armed bank robbery. This action was no doubt based on the fact that the jury did not believe that Harold Mims knew that weapons would be used. Since Mims would easily know this if he were in the bank and in the car, the jury obviously found that he didn't go into the bank. The verdicts of "guilty" on the bank robbery charge is easily supported on the basis of the defendant's admissions alone when you consider that he admitted to entering into the criminal venture, sought to make it succeed, and intended to receive at least some of the proceeds.

POINT III

There was no inference of the existence of prior crimes sought, created or argued by the prosecution and neither the admission of the mug shot of the defendant nor his relation to the F.B.I. encouraged any such inference.

Generally, the trial court is reposed with broad discretion regarding the admission of evidence in a criminal trial. This is especially true where the evidence is circumstantial and its probative worth is in doubt. *Jones v. U.S.* 262 F.2d 44 (4th Cir.) *cert. denied sub nom. Princeler v. U.S.*, 359 U.S. 971 (1959). Moreover, in evaluating evidence the trial court is not bound to exclude evidence which, while standing alone is not determinative of a disputed fact, is part of fabric of proof offered by the government. In this regard, an effort to filter out all circumstantial color and tone would result only in distortion.

In this case, the defendant-appellant complains that the admission into evidence of the "mug shot" of the defendant was error. The photograph in question was taken on the day of his arrest for the very crime for which he was on trial. Not only is this evidence relevant regarding how the defendant looked on the day of his arrest, but further, it is attached to the fingerprint card of the known prints of Harold J. Mims. (Tr. 355-358). Since this photograph was not taken at some prior arrest, there can be no valid claim that it was evidence of the prior criminal character of this defendant.

The defendant-appellant claims that there was further evidence which compounded the prejudice created by the admission of the "mug shot". Specifically, this argument refers to the testimony of Special Agent Schaller regarding the circumstances of the voluntariness of the admissions and confession of the defendant. The Government contends that at no time was the defendant's general criminal character put into issue: no wrongful inference was intended, created or argued.

The defendant claims that the circumstances under which the defendant's statement was taken were highly prejudicial and not admissible. Although somewhat overstated in the defendant's brief (Appellant Brief, Point III), the essence of this claim is that the testimony of the fact that Mims had previously known Agent Schaller and had acted as an informant for him should not have before the jury.

The Government submits that the testimony regarding the advise of rights and the lack of threats and promises to the defendant is very pertinent and properly admissible. Cf. *Shotwell Mfg. Co. v. U.S.*, 371 U.S. 341 (1963); *U.S. v. Brandon*, 467 F.2d 1008 (9th Cir. 1972); *U.S. v. Pomares*, 499 F.2d 1220 (2nd Cir.) *cert. denied*, 419 U.S. 1032 (1974). Furthermore, the necessity of having the complete circumstances before the jury was enhanced because of the cross-examination of Special Agent Green, which took place just prior to the testimony of Special Agent Schaller. (Tr. 531-536). This examination and the resulting testimony of Schaller was probative against the defendant's claim that the only reason he gave a statement was because of a promise that he would be allowed to plead to, or only be charged with, conspiracy.

Although this testimony became highlighted by the repeated objections by defense counsel, it cannot be said that the government was trying to do anything else other than to demonstrate the voluntariness of the admissions. With the clarity of hindsight, it may well be said that such testimony was unnecessary. However, a fair reading of the testimony will clearly show that the defendant was not shown to have, or inferred to have, a criminal nature. Moreover, even if this testimony is deemed to be error, and the government does not concede that it is, when taken with the wealth of other proof against this defendant, it is harmless.

POINT IV

The prosecutor's argument in summation was fair comment on the relevant admissible evidence in the case.

The special position that the government has in the prosecution of criminal cases is well known. As the Supreme Court pointed out in *Berger v. U.S.*, 295 U.S. 78 (1935), the prosecutor

> ". . . is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

Given the standards established in *Berger*, as well as those in cases too numerous for citation, it cannot be said that the comments made by the prosecutor, especially when taken in context, amounted to prosecutorial misconduct. This is especially true where the evidence against the defendant is plentiful and strong. Cf. *U.S. v. Pravato*, 282 F.2d 587 (2nd Cir. 1960); *U.S. v. Torres*, 503 U.S. 1120 (2nd Cir. 1974).

In this appeal, the defendant-appellant refers specifically to three separate areas of claimed prosecutorial misstatements:

1. The prosecutor's statement regarding "bright clothing", used in the bank robbery,

2. The prosecutor's comment on surveillance photographs admitted into evidence, and

3. The prosecutor's comment regarding fingerprints found on the "getaway" car.

It is submitted that in each of the areas of complaint the allegations are exaggerated and misleading. Furthermore, if each area is examined in context with the entire case, and the

evidence submitted, the conclusion would be that the comments were fair and proper.

(1) *Prosecutor's comment regarding "bright clothing"*

The defendant claims that the prosecutor's statement "yes, bright clothing is frequently used in bank robberies" improperly interjected the experienced opinion of the prosecutor.

It is submitted that this statement, when considered in light of the approximately 690 pages of transcript in this case, is totally harmless. Furthermore, this statement is taken out of context. Its appearance in the record corresponds to the prosecutor's examination of clothing worn in the bank robbery. This clothing was properly identified and admitted into evidence. In addition, the defense made an issue of what clothing the defendant was wearing at the time of his arrest, pointing out it was different from that worn by any of the bank robbers. In commenting on this dispute, the government pointed out that the recovered clothing used in the bank robbery (moved into evidence by the government) was the same size as the clothing worn by the defendant at the time of his arrest (moved into evidence by the defense).

The context in which the "bright clothing" comment arose is as follows:

> Mr. Amoroso asked one of the witnesses whether a bank robber would use bright clothing in the bank, wearing a white hat to call attention to himself. It is not unusual at all. Ask yourself what the most important thing is in a bank robbery. If you are committing it, you don't want anybody to see your face. Right? so what do you do? You wear bright clothing. So what are they going to notice? They are going to remember the clothing. "Yes, he wore a white coat." "He wore a blue coat." "What did his face look like?" "I don't know, but I remember the white hat." "I remember the blue coat." "What do you remember about the tall guy?" That attracts at-

> tention, doesn't it? Yes, bright clothing is frequently used in bank robberies. (Tr. 15-16).

It is apparent that the argument was made in response to a question by the defense attorney to a witness and fair comment on the type of clothing in evidence.

(2) ***Prosecutor's comment on surveillance photographs.***

The defendant claims that it was improper for the prosecutor to comment upon the scene depicted in surveillance photographs. The government contends that this claim is exaggerated. Furthermore, the statements were fair comment on government Exhibit 10 which was admitted into evidence, after *voir dire* by defense counsel, with the defense objecting to only one of the four photos and fully aware that they depicted other individuals. (Tr. 218-223).

It is submitted that the prosecutor may comment fairly on any exhibit accepted into evidence. In this case, the prosecutor was commenting on the disputed fact of whether Harold Mims went into the bank or whether his admissions were aimed only at implicating himself in a conspiracy (which obviously carries a shorter maximum term than any substantive count of bank robbery.)

In his admissions, the defendant advised that the bank was "cased" the day before by James Miller. This fact was verified by Richard Ford, the bank manager who activated the camera that produced Government Exhibit 10. In commenting on this evidence the prosecutor attempted to piece together the circumstantial evidence of the defendant's peculiar knowledge of the facts; his apparent attempt to limit his involvement in the scheme and his apparent presence in the photos taken the day before the robbery. This argument, when taken in context, is far more reasonable than the defendant implies:

> Isn't it amazing that Jacob Mims, who says, "No, I don't know anything about this. There must be some

> mistake," and all of a sudden comes up with things that are just absolutely amazing, like the bank was cased the day before and that the police officer entered the bank. He could have been driving by, of course; that the school yard is 2.8 miles from the bank; that a practice run was made that morning; that he knew who exactly was involved. When he was talking about casing the bank, you remember him saying that Miller went in the day before and cased the bank, and he was wearing a white hat and had a light beard, and we know that Ford took pictures of that, and those pictures are in evidence. But I want you to notice something about these photographs. There are four of them, and they show a sequence. They show Miller, who you remember Ford described by pointing an arrow — but look not only at Miller. I want you to take a look at this fellow over here (indicating), who was walking out the front door, and look where he is looking. He is looking into the vault area. As he walks towards that door, his eyes are glued on the vault area, and then he goes out the front door. Look at that profile. Look at the glasses, and then look at the defendant. (Tr. Summation, 20-21).

It is well settled that the admission into evidence of circumstantial proof tending even remotely to establish an ultimate fact is not reversible error. *Clune v. U.S.*, 159 U.S. 590 (1895). In view of this, it cannot be seriously argued that the prosecutor's argument on the same type of evidence is improper.

(3) ***Prosecutor's comment regarding the fingerprint evidence.***

This final claim of prosecutorial misconduct is the most blatant example of taking the argument out of context in order to exaggerate the supposed error. In this part of the brief, the defense quotes a small portion of the prosecutor's statement at page 32. However, this portion was only a recap of evidence

discussed in detail in an earlier portion of the prosecutor's summation. (Tr. Summation, 13-15).

It is submitted that a fair reading of this summation will show beyond doubt that the defendant's claims of error are baseless.

POINT V

The Government adequately sustained its burden of proving that the defendant's statements were voluntarily made to the F.B.I. without threat or promise of reward.

The defendant was given a full and complete hearing relative to the voluntariness of his statements. All of the F.B.I. agents involved testified that the defendant was fully advised of his constitutional rights; understood them and voluntarily waived these rights. Furthermore, the agents testified that the statements were not made under threat, or promise of reward. (Tr. Huntley Hearing).

The Court properly found that the statements were voluntarily given and this decision is supported by substantial evidence.

The defendant disagrees with the Court's decision. That is his right.

However, the defendant has not shown any grounds sufficient to reverse the trial court's decision that the statements were made voluntarily.

CONCLUSION

The defendant was given a full and fair trial and the evidence taken as a whole is substantial enough for this Court to affirm the convictions.

Respectfully submitted,

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

February 28, 1977

Re: United States of America vs. Harold Jacob Mims

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Gerlad Houlihan, Of Counsel

Attorney(s) for

Appellee

On February 28, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

Anthony Amoroso, Esq.
16 East Main Street
Rochester, N.Y. 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

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